delivery of its cable services [43]

Despite the fact that the HFC network remains Telco property, the Department has allowed CTTEL in this proceeding to pursue claims regarding its purported "rights to acquire the HFC network." See Department Ruling, Oct. 11, 2000, at 2. In fact, CTTEL claims that the Department must, in this or a subsequent proceeding, "transfer . . the HFC network to Connecticut Telephone and Connecticut Broadband." CTTEL Application, Part II, at 4. As discussed below, however, the Department simply does not have the authority or jurisdiction to effect such a transfer.

### A. Neither State nor Federal Law Grants the Department the Authority to Effect or Order the Transfer of the Telco's HFC Network.

It is well settled that the Department, as an administrative agency, must act strictly within its statutory authority. Castro v. Viera, 207 Conn. 420, 428 (1988). "Administrative agencies are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the validity of the statutes vesting them with power and they cannot confer jurisdiction on themselves." Id. In short, an administrative agency like the Department cannot act "unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." Hall v. Gilbert and Bennett Manufacturing Co., 241 Conn. 282, 291 (1997) (citation omitted; internal quotations omitted). As the Department itself has recognized:

> Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it . . . . 'It is a familiar principle that a court which exercises a limited and statutory jurisdiction is

[43] See Franchise Modification Decision at 4-5

> without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation.' Figueroa v. C & S Ball Bearing, 237 Conn. 1, 4 (1996), quoting Castro v. Viera, 207 Conn. 420, 427-30 (1988). 'This concept, however, is not limited to courts. Administrative agencies . . . are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the validity of the statutes vesting them with power and they cannot confer jurisdiction upon themselves.'[44]

Here, no provision exists in state law that allows the Department unilaterally to transfer the Telco's assets to a third party. Federal law is equally devoid of such authority. Furthermore, neither state nor federal law permits the Department to order or otherwise compel the Telco to effect the involuntary sale or transfer of its assets to a third party.

More specifically, nothing contained in the Department's enabling statutes, Conn. Gen. Stat. §16-1, et. seq., authorizes the Department to effect the transfer that the CTTEL Companies seek here. Indeed, the provision specifically addressing the sale or disposal of the Telco's assets, Conn. Gen. Stat. §16-43, allows the Department to review and approve transactions *initiated* by the Telco, and only if the transaction involves property "essential" to the Telco's franchise or "useful in the performance of its duty to the public."[45] Nothing in that statute, or elsewhere in the Department's enabling legislation, authorizes the Department to initiate or order the disposal or sale of the Telco's HFC network.

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[44] SPV Franchise Decision at 5 (citations omitted)

[45] See Conn Gen Stat. §16-43 (requiring the Telco, as a public service company, to obtain the approval of the Department to "sell lease, assign, mortgage . or otherwise dispose of any essential part of its franchise, plant equipment or other property necessary or useful in the performance of its duty to the public . ")

Similarly, no provision in the Telecommunications Act of 1996[46] ("Telecommunications Act") expressly provides the Department with jurisdiction to assign, sell or order the involuntary transfer of the Telco's HFC network to CTTEL. Of course, the Telco does not dispute that the Telecommunications Act requires the Telco to provide for interconnection with, and "unbundling" of, certain portions of its telecommunications network to certified local exchange carriers ("CLECs") through interconnection and access to unbundled network elements. See 47 U.S.C. §251. Yet, the power to provide CLECs such access remains a far cry from the power to take, sell or transfer the Telco's HFC network to third parties for cable TV services, especially when the party does not even have the requisite certification to provide CATV service. The former power exists, with limits, in the Telecommunications Act; the latter power does not [47]

Furthermore, it must be noted that even if the Department ignored its limited statutory authority and did transfer the Telco's HFC network to a third party, such action would constitute a taking of the Telco's property. The Fifth Amendment to the United States Constitution and Article I, Section 11, of the Connecticut Constitution provide that private property, such as the Telco's HFC network, cannot be taken for public use

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[46] Pub L No 104-104, 110 Stat 56 (1996), codified at 47 U S C §151, et seq

[47] *If* a franchising authority does have the power under its enabling legislation to effect the involuntary sale or transfer of a cable system, then the Telecommunications Act, 47 U.S C §547, imposes certain conditions on the price paid for such a sale or transfer See 47 U S C. §547 That section of the Telecommunications Act, however, only applies to cable operators and, therefore, would be inapplicable to the Telco Moreover, Section 547 does not, in and of itself, grant franchising authorities the power to effect or order a sale or transfer See H R Rep No 98-934 at 76 (1984) ("[47 U S C. §547] establishes the price at which a franchise authority, *if it has the power to do so or the franchise agreement so provides*, may acquire or effect the transfer of a cable system ") (emphasis added).

without just compensation. Citino v. Redevelopment Agency of City of Hartford, 51 Conn App 262, 278 (1998) Both the Connecticut and United States Supreme Courts also recognize that a taking may occur without an actual or physical appropriation of property by the government. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992); Citino, 51 Conn. App. at 277. Such a taking, known as an inverse condemnation, includes instances in which the government effects a taking through regulations or other acts short of condemnation or eminent domain proceedings. Cohen v. Hartford, 244 Conn. 206, 220 (1996).

While CTTEL has indicated their willingness to pay "fair market value" for the Telco's HFC network, it is the *government* that must pay compensation to the property owner for the taking. Cohen, 244 Conn. at 220. Moreover, the taking requested here -- the involuntary transfer of the Telco's property to CTTEL -- on its face fails the "public use" requirement of takings jurisprudence. See Northeastern Gas Transmission Co. v. Collins, 138 Conn. 582, 593 (1952) (holding that the power to take is "restricted to that which will reasonably serve the public use; more than that would, in effect, be a taking for private use and hence, illegal as an abuse of power"). Indeed, such a taking would instead adversely impact the Telco's *existing* customers, as the Telco would then have to rebuild and redeploy the taken portion of its network so as to provide continual telecommunications services to its customers See AG-12 (noting that "because the Telco is currently using the HFC (Tier 3) fiber to provide other telecommunication services, it would have to be replaced to provide continual telecommunications services to Telco customers").

Accordingly, the Department lacks the necessary jurisdiction under its enabling

statute to effect or order the transfer of the Telco's HFC network to CTTEL or any other company Any such transfer would exceed the Department's statutorily proscribed jurisdiction and constitute an unconstitutional taking of the Telco's property. See Conn. Gen. Stat. §4-183(j) (requiring reversal of an agency's decision that is "in violation of constitutional or statutory provisions" and/or "in excess of the statutory authority of the agency").

### B. The Department Must Reject CTTEL's Interpretation of Conn. Agencies Regs. §16-333-44 as a Source of Authority for the Department to Transfer the Telco's HFC Network.

Notably, CTTEL has not cited one provision in the Telecommunications Act, the Cable Act, or in Conn. Gen. Stat. §16-1, et. seq., as authority for its unprecedented[48] transfer request. Rather, CTTEL apparently relies solely on Regulations of Connecticut State Agencies ("Conn. Agencies Regs.") §16-333-44. As discussed below, CTTEL's reliance on this regulation is misplaced.

Conn Agencies Regs. §16-333-44 provides that "[if] a determination is made to terminate a franchise, the franchise shall continue in operation until replaced, or upon order of the Authority " According to CTTEL, "[t]he apparent intent of RCSA § 16-333-44 is that the Department replace a franchisee with another franchisee so as to protect the public from harm and inconvenience." CTTEL Application, Part II, at 2. Thus, CTTEL continues, "[w]here, as here, a new entity is willing to serve as the replacement franchise holder, the Department should require SNET and Personal Vision to 'hand over the keys' to Connecticut Broadband and Connecticut Telephone." Id.

[48] Research reveals no case in which a court upheld a franchising authority's forced transfer of a network from one company to another.

This interpretation of §16-333-44, however, takes the regulation out of context and ignores its stated purpose. Effective June 27, 1989, Section 16-333-44 was adopted along with several other Department regulations governing the *renewal* of CATV franchises.[49] Not surprisingly, the official stated purpose of the regulation departs significantly from CTTEL's strained interpretation. The drafters of §16-333-44 stated only that "[t]he purpose of sections 16-333-38 through 16-333-45 is to allow compliance with Public Act 88-202, which mandates the provision of an orderly process for the *renewal* of cable franchises."[50]

Public Act 88-202 added several sections to Conn. Gen. Stat. §16-331. Among those amendments was the requirement that the Department adopt regulations, such as §16-333-44, to govern the renewal of CATV franchises

> (5) The [D]epartment shall adopt regulations in accordance with chapter 54, establishing procedures and standards for the renewal of certificates issued to community antenna television companies. Such regulations shall, without limitation, (A) incorporate the provisions of the Communications Act of 1934, 47 USC 546, (B) require the [D]epartment to consult with the advisory council for the franchise area served by the certificate holder before making a decision concerning the renewal of the certificate, (C) *require any holder of a certificate which is not renewed by the [D]epartment to continue to operate the franchise for one year after the end of its term or until a successor is chosen and ready to assume control of the franchise, whichever is sooner* . . . .

Conn. Gen. Stat. §16-331(d)(5) (emphasis added).

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[49] Department of Public Utility Control, Renewal of CATV Certificates and Subscriber and Service Requirements, Connecticut Law Journal, vol 51, no. 7, pp 1b-10b (August 15, 1989).

[50] Id at 10b (emphasis added)

It is axiomatic that an administrative regulation, like the Department itself, *may not* exceed the authority given by the statute under which it was adopted. Aunt Hack Ridge Estates, Inc. v. Planning Commission of Danbury, 160 Conn. 109, 116 (1970). In this case, Conn. Agencies Regs. §16-333-44 was adopted pursuant to Conn. Gen. Stat. §16-331(d)(5). According to the explicit terms of the statute, Section 16-333-44 applies only when the Department decides *not* to renew an existing franchise and CPCN. This matter, of course, is *not* a renewal proceeding. There is no indication in Conn. Gen. Stat. §16-331, or in the regulation's stated purpose, that §16-333-44 applies outside of renewal proceedings, to a franchisee that *voluntarily* seeks to relinquish its CPCN to the Department Certainly, nothing in the regulation's language can be interpreted as an explicit grant of the power authorizing the transfer of the Telco's HFC network without the Telco's consent. Any such interpretation ignores not only the plain language of §16-333-44 but also far exceeds the authority for that regulation contained in Conn. Gen. Stat. §16-331(d)(5).

Indeed, the CATV landscape, which existed at the time §16-333-44 was adopted, further explains why this regulation does not apply to the Companies' Request to Relinquish SPV's CPCN. In June 1989, no competition existed in the CATV industry and incumbent CATV operators held *de facto* monopolies. See SPV Franchise Decision at 24 In such an environment, "any effort by the Department to rescind the certification of a franchisee could have permanently affected the public's access to CATV services." Id Accordingly, the Department imposed various requirements on CATV providers -- like that contained in Conn Gen Stat §16-331(d)(5) -- which were designed to ensure continuous and long-term commitments to CATV franchises. SPV Franchise Decision at

24 (discussing and rejecting the imposition of an investment threshold on SPV).

However, "[w]ith the advent of competitive CATV services, the concerns of the public and thus of the Department have changed." Id. As the Department is aware, every town in which SPV currently offers service is served by at least one certified CATV operator. Moreover, contrary to CTTEL's assertions, SPV is taking substantial steps to ensure not only that its customers are cared for while SPV exits the CATV business, but also that the transition from SPV to the video provider of a customer's choice is as smooth as possible.[51] Thus, unlike the situation which existed in 1989, SPV's withdrawal from the CATV market will not permanently, and should not even temporarily, deprive the public of access to CATV services.

Finally, even if the Department accepts CTTEL's tortured interpretation of §16-333-44, the fact remains that this regulation derives solely from a statute regulating CATV companies. See Conn. Gen. Stat. §16-331. The Telco, however, is not a CATV company. See SPV Franchise Decision at 66. Accordingly, CATV regulations such as §16-333-44 simply do not apply to the Telco. See id. (finding that the Department's CATV construction regulations "do not apply to SNET since it is not a CATV franchise

[51] See Request to Relinquish at 1-3, 16-23

holder"). For this additional reason, as well as those articulated above, the Department cannot rely upon Conn. Agencies Regs. §16-333-44 as a source of authority to transfer the Telco's HFC network to CTTEL or any other company. Accordingly, the Department must reject CTTEL's interpretation of that regulation

**CONCLUSION**

For all the aforementioned reasons, the Companies urge the Department to approve this Request to Relinquish SPV's CPCN and declare that neither CTTEL, nor any other company, has a legal right to the Telco's HFC network.

Respectfully submitted,

**SOUTHERN NEW ENGLAND TELECOMMUNICATIONS CORPORATION, THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, AND SNET PERSONAL VISION, INC.**

By:_____

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December 29, 2000

# Exhibit 4

Gemini Networks CT, Inc.
Interrogatories to The Southern New England Telephone Company

Utilization of Physical Elements Identified in GEM-1

GEM-2 For each physical element of the SNET HFC Network identified in your response to GEM-1 above, please state whether or not such element is currently being utilized and, if so, by whom. For any element which is only partially being utilized, please identify the approximate percentage that is currently being used

Answer. The Telco objects to this interrogatory on the grounds that it requires the Telco to respond in a manner that implicitly acknowledges the term "physical element," which is neither a recognized nor generally accepted term pursuant to the Telecommunications Act of 1996 and Conn Gen. Stat. §16-247b.

The Telco further objects to this request as it is overly burdensome in that it appears to require the Telco to identify every piece part of the decommissioned HFC network and/or inventory such network, which covered thousands of miles in many wire centers throughout the State of Connecticut. The Telco also objects to this interrogatory as overly broad in that Gemini is only requesting that the Telco be required to unbundle a portion of Tier 3 of the decommissioned HFC network; therefore any information about Tier 1 and Tier 2 of the HFC network is irrelevant to any issue in this proceeding The Telco further objects to identifying who is using any specific portion of the network as such information would be competitively sensitive and proprietary to the carrier, and it would be unduly burdensome and oppressive for the Telco to be required to research the identity of each carrier using each strand of fiber, which extends throughout the state of Connecticut Such information is not readily available, would require a special study for the limited purpose of this discovery request, would require significant time, system programming and tabulation, and would require the Telco to expend considerable resources before the Department even determines whether the Telco is required to unbundle the facilities. The Telco further objects that such information would be competitively sensitive, proprietary information of the carrier subscribing to the UNE

The Telco further objects that this request is outside the scope of Phase I and wholly irrelevant to the legal question of whether the Telco is required to unbundle the decommissioned HFC network. As the Department indicated in its February 10, 2003 Response to the Telco's Motion to Dismiss, Phase I is limited to the legal issues related to Gemini's request to unbundle the Telco's decommissioned HFC network. The only issue necessary to a determination of whether the requested portions of Tier 3 of the decommissioned HFC network must be unbundled is whether those facilities are used to provide telecommunications -- not who may be using such facilities Therefore, this request is outside of the scope of Phase I and

Gemini Networks CT, Inc.
Interrogatories to The Southern New England Telephone Company

Utilization of Physical Elements Identified in GEM-1

Answer (continued)

should be deferred to Phase II of this proceeding, should the Department deem a second phase necessary.

Without waiving said objection, the only components identified by the Telco in GEM-1 that are being used are some of the Tier 3 fiber optic cables extending from the End office towards the Electro-Optical Node and the associated Structure All other components identified by the Telco in GEM-1 have been retired from the Telco's books consistent with the Department's ruling in Docket No. 00-08-14, Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc to Relinquish SNET Personal Vision, Inc.'s Certificate of Public Convenience and Necessity

# Exhibit 5

**Mary Burgess**
Senior Attorney

Suite 706
111 Washington Ave
Albany, NY 12210
518-463-3148
Fax No 518-463-5943

September 15, 2003

Louise E. Rickard
Acting Executive Secretary
State of Connecticut
Department of Public Utility Control
10 Franklin Square
New Britain, Connecticut 06051

Re: AT&T Local Residential Total Services Resale
Market Exit Plan for Connecticut

Dear Secretary Rickard:

AT&T Communications of New England, Inc. ("AT&T") has decided to discontinue its local residential Total Services Resale ("TSR") service offering in Connecticut. AT&T hereby submits its Market Exit Plan prepared in accordance with the Connecticut Department of Public Utility Control's Mass Migration Guidelines issued April 2, 2003 in Docket 01-12-10.

AT&T's submission includes a timeline identifying dates for milestones associated with the exit. In order to complete the project by year's end, AT&T's timeline allows for a DPUC staff review period of two weeks prior to initial customer notification. AT&T hereby notifies the DPUC 105 calendar days in advance of its planned service termination date. In order to complete the project by year's end without modifying the customer notification periods required by the Guidelines, AT&T respectfully requests that the Department deem such notice sufficient. A draft of AT&T's proposed customer notification letter is attached to the enclosed Market Exit Plan.

Connecticut Telephone and Communications Systems, Inc. has agreed to be the acquiring carrier in this transaction

pursuant to the Mass Migration Guidelines. Today's filing includes an Acknowledgement of such agreement.

If you have any questions regarding this submission, please contact me at (518) 463-3148.

Respectfully submitted,

Mary E Burgess

Enclosures

September 15, 2003

**Sent via Fax XXX-XXX-XXX**

Melonie Temple
Keith Headen
*SBC-SNET Account Managers for AT&T*

Dear Ms Temple and Mr Headen,

AT&T Communications of New England Inc , (AT&T) has decided to discontinue its local residential Total Services Resale (TSR) service offering in Connecticut

SBC-SNET has been identified as the underlying network provider for AT&T's TSR customers, and is therefore being notified of AT&T's decision pursuant to the Connecticut Department of Public Utility Control's Mass Migration Guidelines

AT&T will contact you shortly regarding the process by which customers will be transferred to other providers

The Department's Mass Migration Guidelines require SBC-SNET to identify and assign a project manager for this transition Please contact me at your earliest convenience with the relevant information regarding the SBC-SNET project manager

Sincerely,

Kaleb Flax
AT&T Program Manager
770-465-4861
kaflax@att com

**RuthAnn F. Brazill**
Manager
State Government Affairs

Room 420
99 Bedford Street
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914 337-1607
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January 22, 2004

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control
10 Franklin Square
New Britain, Connecticut 06051

Re: Obligation to Serve Customers

Dear Secretary Rickard

On behalf of AT&T Communications of New England, Inc ("AT&T"), AT&T hereby submits its response to the questions issued by the Department on December 31, 2003, regarding competitive local exchange carrier ("CLEC") compliance with the requirement to provide local exchange service within 5 years of the date of its certification.

If you have any questions concerning the attached response, please do not hesitate to contact me

Respectfully submitted,

RuthAnn F. Brazill

1 Is the company currently providing local exchange service to any and all customers requesting such service in the service area as provided for in its Certificate of Public Convenience and Necessity (CPCN)? If so, provide specific information on the company's local exchange offerings and locations (e g , when it was first offered, residential and/or business accounts, plans for further expansion, etc.) If not, when does the company intend to provide local service in its service territory?

AT&T offers the following Business Local Services

1 AT&T Digital Link Service(1996)
2 AT&T All in One Service (2000)
3 AT&T Local on ABN/One Net Service
4 ACC Business Service

With respect to residential local offerings, presently, AT&T does not offer service to residential customers in Connecticut In December, 2003, AT&T successfully migrated all customers formerly serviced by Total Service Resale to other local service providers in the state Although AT&T would have preferred to have retained these local residential customers by migrating them to a UNE-P serving arrangement, the current ILEC UNE rates in Connecticut prohibit AT&T from economically serving residential customers

Connecticut is an important consumer market for AT&T Therefore, AT&T will work with the Department in its future reassessment of UNE rates, and will actively participate in the CT Impairment Proceeding, Dkt 03-09-01, as the docket will be determinative of the development of residential competition throughout Connecticut

2 If the company is not currently providing local exchange service to any and all customers requesting such service in its service territory, explain how the company meets the obligation to service requirements provided for in the Decision in the above noted dockets and its own CPCN

Please see AT&T's response to Question 1

# Exhibit 6

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January 2, 2003

VIA HAND DELIVERY

Ms. Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control
Ten Franklin Square
New Britain, Connecticut 06051

Re: Docket No. 03-01-__; Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company's Unbundled Network Elements

Dear Ms. Rickard:

Enclosed for filing on behalf of Gemini Networks CT, Inc. please find and original and fifteen (15) copies of Gemini's Petition for Declaratory Ruling.

If you have any questions with respect to this filing, please contact the undersigned.

Respectfully submitted,

GEMINI NETWORKS CT, INC.

By Jennifer D. Janelle
Jennifer D. Janelle
Its Attorney

C: Office of Consumer Counsel
Richard C. Rowlenson, Esq.
Peggy Garber, Esq.

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STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL

| | | |
|---|---|---|
| PETITION OF GEMINI NETWORKS CT, INC. | : | |
| FOR A DECLARATORY RULING | : | DOCKET NO. 03-01-__ |
| REGARDING THE SOUTHERN NEW | : | |
| ENGLAND TELEPHONE COMPANY'S | : | |
| UNBUNDLED NETWORK ELEMENTS | : | JANUARY 2, 2003 |

## PETITION FOR DECLARATORY RULING

Pursuant to Connecticut General Statutes Sections 16-247a, 16-247b(a), 16-247k(b)(4), 16-11, and 4-176 and regulations promulgated thereunder, Gemini Networks CT, Inc. ("Gemini") respectfully requests that the Department declare that certain hybrid fiber coax ("HFC") facilities owned by the Southern New England Telephone Company ("SNET") and formerly leased to SNET Personal Vision, Inc. ("SPV") constitute unbundled network elements ("UNEs") and as such must be tariffed and offered on an element by element basis for lease to Gemini at total service long run incremental cost ("TSLRIC") pricing. Should the Department determine that such plant does constitute UNEs subject to appropriate unbundling and pricing in accordance with this request, Gemini requests that the Department immediately initiate a cost of service proceeding to determine the appropriate pricing structure, based on TSLRIC, for such UNEs. Gemini requests that the Department order SNET to file an inventory of all plant formerly leased to SPV including the condition of all such plant and the disposition of any plant no longer in place.

Gemini attempted to enter into negotiations with SNET for lease of portions of the HFC facilities pursuant to state and federal law. However, SNET refused to negotiate for the lease of the HFC facilities as SNET declared that such facilities are not UNEs and therefore not subject to unbundling or regulation as UNEs. Thus, Gemini is filing this request that the Department declare the HFC facilities to be UNEs so that Gemini may re-enter negotiations with SNET to obtain access to certain of the UNEs pursuant to applicable pricing and regulations, as further discussed herein below.

Gemini submits that its request furthers the goals of the State of Connecticut codified in General Statutes § 16-247(a) to promote the development of effective competition, facilitate the efficient development and deployment of an advanced telecommunications infrastructure and encourage the shared use of existing facilities. Gemini further submits that its request will benefit all parties, in that it will promote competition to the benefit of consumers, assist Gemini in the rapid deployment of its network and services, and provide revenue to SNET for currently unused portions of its network.

## I. Background.

Gemini is a Delaware corporation authorized to do business in Connecticut. Gemini operates broadband network facilities in Connecticut as authorized by the Connecticut Department of Public Utility Control ("the Department") and holds a certificate of public convenience and necessity ("CPCN") to operate as a certified local exchange carrier ("CLEC") in Connecticut. Gemini currently provides Internet services in parts of Connecticut and seeks a favorable determination in this proceeding in order that it can proceed with the deployment of voice services in accordance with its CPCN.

On December 29, 1994, SNET first filed its I-SNET Technology Plan with the Department. SNET announced construction of I-SNET, ". . . which included statewide outside plant modernization utilizing HFC and switch upgrades."[1] SNET revised its I-SNET Technology Plan, filing the revised plan with the Department on April 11, 1995 (the "Plan"). The Plan described I-SNET as a "full service network that can provide a full suite of voice, data and video services."[2] The goal of the I-SNET plan was "the transformation of Connecticut's existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications. **I-SNET will supersede the Company's existing infrastructure**. . . ."[3] I-SNET deployment included the total migration of the interoffice transport network to

[1] Decision, Docket No. 99-04-02, Application of SNET Personal Vision, Inc. to Modify Its Franchise Agreement, August 25, 1999 at 4 ("SPV Modification Decision").
[2] Decision, Docket No. 94-10-03, DPUC Investigation Into The Southern New England Telephone Company's Intrastate Depreciation, November 31, 1995 at Table B, p. B.
[3] Id. (emphasis added).

a SONET-based digital broadband platform and retirement of the existing embedded base of copper cable, circuit switching, computing and associated common and complimentary assets.[4] I-SNET was to become the local exchange network.

Subsequent to the filing of SNET's I-SNET Technology Plan, SPV applied to the Department and was granted a statewide CATV franchise to provide video services over the I-SNET network.[5] SPV leased network capacity from SNET for purposes of deploying SPV cable television services. SPV was responsible for certain direct costs relating to video and 50% of the HFC costs. The basis for this cost-sharing arrangement was the prospect that each home that passed the HFC network would subscribe to SNET telephone service and SPV cable service.[6] The HFC network was planned and designed both to serve voice customers and to provide transport for video services. In effect, the HFC network was designed to be used as SNET's local exchange network. Therefore, the portions of the I-SNET HFC network that were used or proposed to be used by SNET for transport of voice traffic constitute part of the SNET local exchange network and are subject to UNE unbundling requirements.[7]

Approximately five years after receiving its CATV CPCN, SNET and SPV applied for and secured Department approval to relinquish the SPV CPCN.[8] In granting the SPV relinquishment request, the Department recognized the public interest benefits of making the I-SNET network available to other carriers.[9] The Department urged SNET to liberalize its unbundling policies and strongly suggested that SNET should file a tariff and take such other action as would assist other communications companies, such as Gemini, to develop their networks, including up to complete end-to-end connectivity. The Department stated that it expected any party aggrieved by SNET's failure to work in good faith to that end, to notify the Department.[10]

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[4] Id. at p. C
[5] Docket No 96-01-24.
[6] SPV Modification Decision at 4-5.
[7] Id
[8] Decision, Docket No. 00-08-14, Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc to Relinquish SNET Personal Vision, Inc.'s Certificate of Public Convenience and Necessity, March 14, 2001 ("SPV Relinquishment Decision")
[9] Id at 31
[10] Id

Finally, the Department directed SNET not to sell, transfer or remove any of the I-SNET HFC network used by SNET or SPV without prior submission of an organized disposition plan and Department approval.[11] It is Gemini's understanding that, to date, SNET has made no such filings with respect to the HFC plant that is the subject of this Petition.

## II. The HFC Plant is a UNE.

Despite SNET's bald assertion that the HFC plant which is the subject of this Petition is not a UNE and not subject to unbundling,[12] ample case law exists which makes clear that the HFC plant is in fact a UNE subject to unbundling. A network element is "a facility or equipment used in the provision of a telecommunications service."[13] As demonstrated in Section I above, SNET's HFC plant was designed and constructed to provide voice service.

In the Fourth Circuit, Bell Atlantic had claimed that equipment must be in actual use, and not merely capable of being used to qualify as a network element. The Court rejected this argument.[14] The Court held that such an interpretation placed undue weight on the word "used" and was contrary to the United States Supreme Court's acknowledgement that "network element" is broadly defined.[15]

In agreeing with the broad definition of network element, the Eastern District of Michigan, citing the Southern District of Iowa, held:

> A limiting definition of network element, such as the one offered by US West, would allow an ILEC to avoid making equipment available to CLECs merely because the equipment is not necessarily in use. For example, a local loop servicing a particular residence, which is in all other respects a network element, would not be available to a CLEC if the house was temporarily vacant and not subscribing to telephone service. This result is inconsistent with the scope of the language of the Act as interpreted by the FCC. See 47 C.F.R. § 51.319(a) (providing

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[11] Id. at 32.
[12] See Section IV and n.44, infra.
[13] 47 U S C § 153(29).
[14] AT&T Communs. of Virginia v. Bell Atlantic-Virginia, 197 F 3d 663, 672 (1999) citing US West Communications., Inc. v. Jennings, 46 F. Supp. 2d 1004, 1018-19 (D. Ariz. 1999); MCI Telecomms Corp v. BellSouth Telecomms., Inc , 40 F. Supp. 2d 416, 425 (E.D. Ky. 1999).
[15] Id. citing AT&T Corp. v Iowa Utils. Bd , 525 U S. 366 (1999).

that an ILEC must provide nondiscriminatory access to local loops on an unbundled basis).[16]

The Eastern District of North Carolina has ruled that it is irrelevant whether the facilities in question are actually being used to provide telephone service to any consumer.[17]

Additionally, the Federal Communications Commission ("FCC") has ruled that "incumbent LECs must provide unused copper transmission facilities as an unbundled network element, to the extent such facilities exist."[18]

Thus, the only relevant inquiry according to FCC rules is whether "the failure to provide access to such . . . element[] would impair the ability of the [CLEC] seeking access to provide the services that it seeks to offer."[19] As previously stated, access to portions of SNET's HFC plant is necessary for Gemini to continue with its business plan and proceed with the deployment of voice services in accordance with its CPCN. Moreover, denying Gemini access to portions of the HFC plant as UNEs would force Gemini to construct duplicative facilities when such facilities already exist and are not being used. Such is contrary to Connecticut state telecommunications law.[20]

## III. Federal and State Law Require Lease of UNEs to Gemini Upon Request

Federal and state law require that SNET make available to Gemini non-discriminatory access to UNEs at reasonable, nondiscriminatory terms and conditions.[21]

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[16] MCI Telecomms. Corp. v Michigan Bell Tel Co., 79 F. Supp. 2d 768 (E.D. Mich. 1999) (citations omitted).

[17] MCI Telecomms. Corp v. BellSouth Telecomms., Inc., 7 F. Supp. 2d 674 (E.D. N.C. 1988).

[18] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 F.C.C.R. 3696 at ¶ 174 (1999).

[19] 47 U.S C § 251(d)(2)(B)

[20] See Conn. Gen. Stat. § 16-247a.

[21] 47 U.S C § 251(c) provides in pertinent part as follows:

> "(c) Additional obligations of incumbent local exchange carriers.
>
> In addition to the duties contained in subsection (b), of this section, each incumbent local exchange carrier has the following duties:
>
> (3) Unbundled access

Federal law requires that Gemini be provided with access to UNEs.[22] SNET has wrongly denied Gemini access to portions of SNET's HFC network. The HFC network elements requested by Gemini are essential to its ability to provide the telecommunications services that it seeks to offer in Connecticut. Gemini has designed and constructed an initial HFC network in Connecticut, but requires access to additional, cost-effective HFC facilities in portions of the Connecticut market in order to serve Connecticut residents and businesses.[23]

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> The duty to provide to any requesting telecommunications carrier for the provision of telecommunications services, non-discriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

[22] 47 U.S.C. § 251(d) provides in pertinent part as follows:

> "(d) Implementation.
>
> (2) Access Standards.
>
> In determining what network elements should be made available for purposes of (c)(3) of this section, the [Federal Communications] Commission should consider at a minimum whether -
>
> (A) Access to such network elements are as proprietary in nature is necessary; and
>
> (B) The failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer " [Bracketed material supplied.]

Conn. Gen. Stat. § 16-247b requires the unbundling of network elements, services and functions used to provide telecommunications services which are in the public interest, consistent with federal law and technically feasible of being tariffed and offered separately or in combinations at rates, terms and conditions that do not unreasonably discriminate among actual and potential users and providers of such local network services.

Conn Gen Stat § 16-247b(b) provides that SNET must provide "reasonable nondiscriminatory access and pricing to all telecommunications services, functions and unbundled network elements and any combination thereof necessary to provide telecommunications services to customers.

[23] Gemini has the requisite Department authorizations to offer these services, with respect to those services over which the Department has jurisdiction. Of course, Gemini has the right to use UNEs for any purpose that it chooses, subject to compliance with federal and State of Connecticut laws and regulations SNET may not dictate or otherwise limit the services that Gemini offers.

Use of portions of SNET's HFC network in some parts of Connecticut, rather than building a duplicative network, will also fulfill the Connecticut statutory goals of facilitating the efficient development and deployment of an advanced telecommunications infrastructure, including open networks with maximum interoperability and interconnectivity, and of encouraging the shared use of existing facilities.[24]

Both the Department and the FCC have adopted rules and policies designed to make UNEs available to authorized telecommunications carriers such as Gemini.[25] FCC rules impose on SNET a duty to negotiate in good faith with Gemini.[26] The FCC has provided examples of bad-faith negotiating conduct.[27] For example, ILECs like SNET cannot impose limits, restrictions or use requirements on UNEs.[28] Further, SNET must grant the same quality and quantity of access to UNEs to Gemini that it granted to its affiliate SPV.[29] SNET must allow Gemini to combine UNEs in a way in which Gemini desires to provide its intended telecommunications service.[30] There are a variety of additional obligations to which ILECs like SNET must adhere. The purpose and spirit behind the FCC's negotiating requirements are to make feasible, promote, and expedite use of incumbent local exchange facilities for development of competitive, new and innovative telecommunications services to residents and businesses - in this case, Connecticut residents and businesses.[31]

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[24] Conn Gen. Stat. § 16-247a(a)(4) and (5).
[25] 47 C.F R §§ 51.301, et seq.; see 47 C.F R. § 307 in particular.
[26] 47 C.F.R § 51 301(a)
[27] 47 C.F R. § 51 301(b).
[28] 47 C.F R § 51 309.
[29] 47 C.F R. § 51.311(a).
[30] 47 C.F R. § 51 315.
[31] Unfortunately, Gemini is no longer engaged in the UNE negotiation process with SNET, as SNET has declared the HFC plant to be, in its belief, not subject to the UNE process. At such time as the Department rules that the HFC plant is a UNE subject to unbundling, Gemini will reinitiate the negotiation process with SNET pursuant to the prescribed method under federal law, including any necessary mediation or arbitration. However, while such negotiation procedures are available to Gemini in the event that the Department issues a favorable ruling in this proceeding, Gemini respectfully requests that the Department consider ordering expedited action on SNET's part to make the requested UNEs available to third parties such as Gemini Reinstatement of the negotiation process subsequent to a favorable ruling in this proceeding will further delay Gemini's access to portions of the HFC network and provision of competitive services to Connecticut residents. SNET has every incentive to utilize such procedures to delay competition as long as possible Since the DPUC has already made clear to SNET

SNET must make the UNEs requested by Gemini available at TELRIC pricing,[32] although as described below TSLRIC pricing may be more appropriate.

State public utility commissions are authorized under federal law to establish access and interconnect obligations of ILECs such as SNET.[33] The State of Connecticut, prior to implementation of the federal Telecommunications Act, enacted legislation that in large part imposes the same access and interconnect obligations on SNET as the federal Act.[34] The Department has made repeated policy statements in favor of competitive telecommunications service offerings to Connecticut residents and businesses.[35]

The Connecticut General Assembly has succinctly stated Connecticut's telecommunications policy goals:

> **Sec. 16-247a. Goals of the state. Definitions.** (a) Due to the following: Affordable, high quality telecommunications services that meet the needs of individuals and businesses in the state are necessary and vital to the welfare and development of our society; the efficient provision of modern telecommunications services by multiple providers will promote economic development in the state; expanded employment opportunities for residents of the state in the provision of telecommunications services benefit the society and economy of the state; and advanced telecommunications services enhance the delivery of services by public and not-for-profit institutions, it is, therefore, the goal of the state to (1) ensure the universal availability and accessibility of high quality, affordable telecommunications services to all residents and businesses in the state, (2) promote the development of effective competition as a means of providing customers with the widest possible choice of services, (3) utilize forms of regulation commensurate with the level of competition in the relevant telecommunications service market, (4) facilitate the efficient development and deployment of an advanced telecommunications infrastructure, including open networks with maximum interoperability and interconnectivity, (5) encourage shared use of existing facilities and cooperative development of new facilities

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that the public interest favors making the HFC network available to third parties seeking to use it, see n.36, infra, expedited action is appropriate.

[32] Verizon Communications, Inc. et al. v. FCC, 535 U.S 467 (2002)

[33] 47 U.S C § 251(c)(3)

[34] Codified at Conn Gen. Stat § 16-247a et seq.

[35] See, e.g , Proposed Framework for the Implementation of Public Act 94-83 and Commentary from Chairman Reginald J Smith, Presented at the June 23, 1994 Technical Meeting, Docket No 94-05-26, General Implementation of Public Act 94-83; and most recently Scope of Proceeding, Docket No. 02-04-22, DPUC Evaluation of the Transition of the Connecticut Telecommunications Market to Competition, May 15, 2002, among many others.

where legally possible, and technically and economically feasible, and (6) ensure that providers of telecommunications services in the state provide high quality customer service and high quality technical service. The department shall implement the provisions of this section, sections 16-1, 16-18a, 16-19, 16-19e, 16-22, 16-247b, 16-247c, 16-247e to 16-247i, inclusive, and 16-247k and subsection (e) of section 16-331 in accordance with these goals.

The Department itself has already tacitly recognized the HFC network formerly utilized by SPV as a telecommunications network subject to regulation. In its Decision in Docket No. 00-08-14, considering the disposition of the network as a cable television facility, the Department stated:

> In the absence of any formal requirement for the Telco to liberalize its collocation and unbundling policies, the Department encourages the Telco to work with prospective video services providers interested in acquiring more technical services and support than the Telco's currently tariffed services offer. The Department fully understands that [sic] limits of the Telco's legal obligation under federal law to support unbundling and collocation, but the Department also believes that it has independent authority under Conn. Gen Stat. §§ 16-247a(a)(2), 16-247b(b) and 16-247k(b)(4) to pursue such measures as it deems necessary to achieve the expressed goals of the Connecticut General Assembly in Public Act 94-83. Therefore the Department encourages the Telco to work and negotiate in good faith with any party interested in developing such an arrangement (i.e., complete end-to-end connectivity), and would expect any party aggrieved under the Telco's failure to do so, to formally notify the Department. Upon such a showing, the Department will be compelled to consider a generic investigation to update and review implications of collocation and advanced service policies pursuant to provisions and current interpretations of the Telcom Act.[36]

Unbundled network elements, among other services and functions, must be offered, under tariff ". . . at rates, terms and conditions that do not unreasonably discriminate among actual and potential users and actual and potential providers of such local network services."[37]

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[36] SPV Relinquishment Decision at 31-32 (emphasis added)
[37] Conn Gen Stat. § 16-247b(a).

The FCC requires the use of TELRIC pricing;[38] the Department mandates TSLRIC as a basis for UNE pricing, which must be under tariff.[39]

Prior to passage of the federal Telecommunications Act in 1996, the Department was already in the process of implementing telecommunications competition in Connecticut based on the passage of Public Act 94-83. As part of its investigation into UNE pricing methodologies, the Department evaluated TELRIC pricing and rejected it.[40] The Department found that "[t]he TSLRIC methodology represents a modification of the [TELRIC] approach by utilizing total demand for a service as the base for calculating the incremental cost of addition, replacement or enhancement to the service. This produces a forward-looking cost similar to the [TELRIC] methodology, but reduces some of the economic distortions that might otherwise emerge using a narrower base of analysis."[41] The Department also "place[d] SNET on notice that in the future it must be prepared to efficiently conduct cost studies on any service or service elements that are deemed necessary by this Department for competitive access to, and/or use of, SNET's infrastructure. Any failure by SNET to meet the prescribed requirements to perform such analysis and render satisfactory results could be construed as an intentional effort to impede the implementation of Public Act 94-83 and would not be considered lightly by this Department "[42] Gemini accordingly requests that the Department initiate a cost of service proceeding to determine the appropriate TSLRIC pricing for the UNEs which Gemini is requesting.[43]

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[38] 47 C F R § 51 505

[39] Conn. Gen Stat § 16-247b(a).

[40] Decision, Docket No. 94-10-01, DPUC Investigation Into the Southern New England Telephone Company's Cost of Providing Service, June 15, 1995. See also, Decision, Docket No. 96-09-22, DPUC Investigation Into the Southern New England Telephone Unbundled Loops, Ports and Associated Interconnection Arrangements and Universal Service Fund in Light of the Telecommunications Act of 1996, April 23, 1997 at 6, n.1

[41] Decision, Docket No. 96-09-22, DPUC Investigation Into the Southern New England Telephone Unbundled Loops, Ports and Associated Interconnection Arrangements and Universal Service Fund in Light of the Telecommunications Act of 1996, April 23, 1997 at 8

[42] Decision, Docket No. 94-10-01, DPUC Investigation Into the Southern New England Telephone Company's Cost of Providing Service, June 15, 1995

[43] The 11th Circuit has held that use of TSLRIC as an economic cost basis for use of an ILEC's network is improper as a result of the U. S Supreme Court's ruling in Verizon Communications, Inc v. FCC, 535 U.S. 467 (2002), which found that the FCC did not act unreasonably in requiring state utility commissions to set rates charged by ILECs for leased elements based on TELRIC as opposed to TSLRIC. MCI Telecomms. Corp. v Bellsouth Telecomms., Inc., 298 F.3d 1269 (11th Cir 2002)

In summary, there is a clear-cut history and record at the Department of SNET's transactions with its affiliate, SPV. It is anti-competitive and discriminatory for SNET to refuse to provide UNEs from SNET's HFC network to Gemini. SNET must provide the UNEs to Gemini, priced at rates based on TSLRIC via tariffs approved by the Department, consistent with federal and Connecticut statutory and regulatory authority and policy.

## IV. Negotiations with SNET.

On June 25, 2002, Gemini formally requested negotiations with SNET to lease portions of SNET's HFC network formerly utilized by SPV pursuant to 47 U.S C. §§ 251(c)(1), 251(c)(3) and 252(a)(1). On July 3, 2002, SNET responded to Gemini's request, inviting negotiations, but rejecting without explanation Gemini's assertion that portions of the HFC network constituted UNEs. Gemini and SNET met on several occasions in an attempt to resolve their differences. Ultimately, SNET advised Gemini on September 10, 2002 that it does not believe that the HFC facilities formerly utilized by SPV are subject to unbundling.[44]

Gemini has some information regarding the HFC network. Gemini is not providing specific details herein as it has executed a nondisclosure agreement with SNET. Nonetheless, Gemini is specifically requesting that the entire HFC network formerly utilized by SPV be unbundled, tariffed and offered as UNEs in accordance with state and federal law.

## V. Conclusion.

WHEREFORE, Gemini respectfully requests that:

a. the Department declare that the HFC network formerly leased by SPV is subject to unbundling and tariffing as UNEs pursuant to Conn. Gen. Stat § 16-247b(a);

b. the Department initiate an expedited cost of service proceeding to determine the rates at which such UNEs will be offered pursuant to Conn. Gen Stat. § 16-247b(b); and

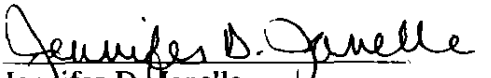
[44] SNET provided no legal argument to support its theory, despite the fact that Gemini thoroughly stated its legal position to SNET in substantially the same form as provided herein. SNET merely stated that it "has no desire to entertain a lease of the facilities to Gemini or any other party ." SNET letter to Gemini, September 10, 2002

c. the Department order SNET to provide an immediate inventory of the remaining HFC plant, including the condition of such plant and an itemized list of any portions of the plant previously disposed of.

Gemini respectfully requests that this proceeding be expedited. Gemini further requests that, in the event that the Department concludes that testimony or other evidence is relevant to a decision on this matter, the Department clarify the issues on which pre-filed testimony would be relevant and material.

Respectfully submitted,

GEMINI NETWORKS CT, INC.

By 
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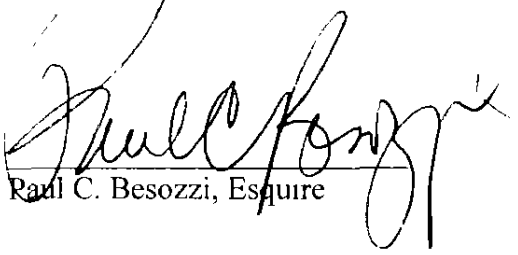
By. 
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